No. 11720

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR LEE FLYNN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED.

Cases

Statutes

Textbooks

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APPELLEE'S BRIEF.

Jurisdiction.

The appellant was indicted under the perjury statute, 18 U. S. C. A. 231. The District Court had jurisdiction under 28 U. S. C. A. 41(2) and 18 U. S. C. A. 546. The offenses charged were committed in the Southern District of California in a criminal prosecution for impersonation,—United States vs. Arthur Lee Flynn, No. 19209 Crim.

Symbols of Reference.

The references hereinafter contained, preceded by "R" are to the record in this case which is the typewritten transcript of the said record on which this appeal was permitted to be considered by this court. Those references preceded by "AOB" are to the appellant's opening brief before this court. The appellant was convicted by a jury on August 5, 1947 before Honorable Dave W. Ling, Judge presiding, in the Southern District of California. Sentence was imposed on the defendant August 18, 1947.

Statement of the Case.

The appellant was indicted on June 18, 1947, in the United States District Court for the Southern District of California, under 18 U. S. C. A. 231, for perjury in seven counts. All counts of the indictment alleged the specific acts of perjury which were committed in open court by the appellant in a case charging impersonation, which case was tried in the Southern District of California, on or about April 22 and 23, 1947, Criminal No. 19209, entitled United States vs. Arthur Lee Flynn. The case herein appealed is the case of United States of America vs. Arthur Lee Flynn, Criminal No. 19426.

The indictment charged the offense in each of the seven counts in substantially the language of the statute and clearly set forth the false statements alleged to have been made wilfully and contrary to his oath in certain material matters, the defendant then and there well knowing that his statements under oath were false and untrue.

On June 23, 1947, the appellant was arraigned and pleaded not guilty to all counts of the indictment and the case was set for trial July 29, 1947. The court appointed Robert H. Green, Esq., 215 West 7th Street, Los Angeles 14, California, to represent the defendant in this action, and the record will show that the defendant was adequately represented by competent counsel in the entire proceeding. The appellant filed an affidavit and petition pursuant to Rule 17 of the Rules of Criminal Procedure, for an order that a subpoena be issued for the Honorable Daniel M. Lyons, Pardon Attorney, United States Department of Justice, Washington, D. C., and for the Honorable Clyde O. Eastus, formerly United States Attorney, Dallas, Texas, which petition was denied by the Judge.

Upon conviction by the jury, motions for a new trial and in arrest of judgment were properly denied by the Judge on August 18th, and the defendant was committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of three years in an institution of the penitentiary type, to be selected by the Attorney General on each of the seven counts of the indictment, the said terms to begin and run concurrently and in addition thereto, to pay a fine of one cent unto the United States on each of the seven counts, concurrently, making a total fine of one cent, to stand committed until paid. The appellant having noted his appeal, and having filed his brief on appeal, relies on certain points, all of which will hereinafter be shown to have no merit, either based upon the record or otherwise. The appellant also has filed with this court a motion for leave to file and prosecute a further motion in the District Court to vacate the judgment in this case and both his appeal and this motion are to be considered together by order of this court.

Statement of the Facts.

Counts One and Two.

The first count of the indictment charges appellant with the crime of perjury, in that on or about June 19, 1941, while appearing as a witness on his own behalf at the trial in the United States District Court at Los Angeles, appellant while under oath falsely testified that he had not been convicted of a felony on or about June 19, 1941; and, further, that after having examined an exemplified copy of a judgment of the District Court of the United States for the Northern District of Texas—which judgment recited that Arthur L. Flynn had been convicted of

the crime of impersonating a federal employee—appellant stated that he was not the Arthur L. Flynn named in such judgment; whereas, in truth and in fact appellant had been convicted of a felony on or about June 19, 1941, and he was the Arthur L. Flynn named in said judgment. Appellant was charged in Count Two of having committed the crime of perjury in that, in the course of the same trial referred to in Count One, appellant while testifying under oath stated that he had not been in Dallas, Texas, during 1941; whereas, in truth and in fact he had been in Dallas, Texas, during 1941, as he well knew.

The Government then offered the testimony of L. B. Figg, Deputy Clerk of the District Court, who testified that he was the courtroom clerk in Judge Weinberger's court on April 22, 1947, and that he marked certain exhibits received in evidence on that date, in Criminal case No. 19209. Government's exhibits in the instant case Nos. 2, 3, and 4 respectively [R. I, 25-27]. These exhibits were numbered 3, 7 and 8 in the former trial.

The Government then called Rufus H. Pevehouse, Deputy United States Marshal from Dallas, Texas, who testified [R. I, 29-39] that he knew the defendant; that in his official capacity as a Deputy United States Marshal in June of 1941, and specifically on June 19, 1941, he had custody of this defendant throughout the trial at which he was convicted in Dallas, Texas, and that upon the order of commitment of the defendant to the Federal Correctional Institution at Texarkana, Texas, he transported the said defendant on June 30, 1941 to that Institution, along with 24 other prisoners.

The Government then called as a witness Joseph L. Schmidt, Special Agent of the Federal Bureau of Investigation, who testified [R. I, 39 to R. I, 42] that he

investigated the case involving Arthur Lee Flynn; that he was present at the trial in Dallas, Texas, on June 19, 1941 and was there when sentence was pronounced; that he recognizes the appellant in this case as the same Arthur Lee Flynn who was convicted in Dallas, Texas, June 19, 1941.

The Government then called W. P. Jacquot, the Custodian Supervisor of the Federal Correctional Institution at Texarkana, Texas, in 1941, who testified that he recognized the appellant in this case as the same Arthur Lee Flynn who was committed to that Institution on June 30, 1941, and that said appellant served time there from June 30, 1941 until November 18, 1941. This witness produced the original commitment papers and they were offered in evidence as Government's Exhibit 5. This witness identified the fingerprints, or thumbprints, which were a part of the prison records, and testified that he made those prints from the thumb of Arthur Lee Flynn, the prisoner in the Dallas case above-referred to, and that the appellant in this case is the same Arthur Lee Flynn. He further testified that on November 18, 1941 he released Arthur Lee Flynn to J. P. Townsend, Deputy Sheriff of Dallas County, Texas, and identified a receipt signed by Mr. Townsend for the defendant's delivery to him.

The Government then called John W. Schilling, Deputy Sheriff of Los Angeles County, who identified several fingerprint records taken of the appellant, Arthur Lee Flynn, who testified that he compared a set of fingerprints taken of this appellant by himself on March 8, 1947 [Gov. Ex. 6] with fingerprints taken by other attachés of the Sheriff's office on the same date [Gov. Exs. 7 and

8], and with a set of fingerprints taken April 23, 1947 by other attachés of the same office [Gov. Ex. 9].

The Government then called witness Quinn Tamm, an inspector and fingerprint expert from the Federal Bureau of Investigation office in Washington, D. C., who qualified as an expert on the witness stand, and who produced 19 fingerprint cards kept under his direction in the Federal Bureau of Investigation at Washington, and who identified fingerprints of appellant taken beginning in 1940 [R. I, 59]; and Mr. Tamm testified further regarding these fingerprints that he had examined Government's Exhibit 6 together with the fingerprint records from the Washington office and that they all correspond and are identical fingerprints of the same individual [R. I, 61]. Sixteen of these nineteen cards were marked Government's Exhibits 12 to 27, inclusive, and the dates and places from which they came are set forth and verified by this witness [R. I, 63-64] as beginning November 18, 1940 to April 24, 1947, and they were received into evidence.

To refute the appellant's statement that he was in the army and was not in Dallas, Texas, on June 19, 1941 or at any time during 1941, the Government called as a witness Colonel Elmer C. Gault who testified [R. I, 66] that he was Chief of the Demobilized Personnel Records Branch of the United States Army at St. Louis, Missouri. He introduced into the record the Army record of Arthur Lee Flynn, Serial No. 18179191 [Gov. Exs. 28 and 29]. This exhibit shows that the appellant enlisted in the Army of the United States on October 11, 1942 and was discharged May 25, 1943. These exhibits [R. I, 71] were explained by Colonel Gault as showing the appellant's assignments as being always the rank or rate of private.

The testimony of this witness and the Army record, Government's Exhibits 28 and 29, conclusively establish the fact that this appellant was not in the Army of the United States during the year 1941 and was only in such service for the period October 11, 1942 to May 25, 1943, and was never in such service before or after these dates. The record clearly discloses that there was never any overseas service; that there was never any service with the paratroops: that he was never in the ferry command or the transport command as a soldier. Colonel Gault testified that a solder is not necessarily required to receipt for a discharge; if, however, he is present and handed his discharge, sometimes a receipt for it is taken. Colonel Gault also testified [R. I, 86] that the enlistment record would show service in the National Guard if the appellant ever had such service, and according to the enlistment record by the appellant's own statement he never had any other service such as National Guard, etc. Colonel Gault testified that this is the complete service record of appellant and that due search of the Army records had been made and no other record of this appellant found.

The Government then called as a witness Reinhold A. Wahl, Assistant Custodian of Selective Service records in the State of Texas, who identified a selective service file on one Arthur Lee Flynn. Mr. Quinn Tamm, the Federal Bureau of Investigation fingerprint expert, was again recalled to the stand and testified [R. I, 93] that he had examined the fingerprint record in the Army Service file of Arthur Lee Flynn, Exhibit 29-A, with the other fingerprints previously referred to and introduced into the record, and that they were all of the same individual.

The Government then called as a witness C. E. Kindelberger who testified that he was a brother of the president

of the North American Aviation Company and that he was employed by that company in Dallas, Texas, in 1941, in fact, from 1940 until November, 1946; that he knew Arthur Lee Flynn, the appellant in this case, and that he first met the appellant in January, 1941 and saw him most every day thereafter for approximately three months.

The Government then called as a witness Walter Louis Smeton who testified [R. I, 99] that he was a supervisor at the North American Aviation plant from October, 1940 until September, 1945; that he knew the appellant and saw him at the plant for about three and one-half months in the early part of 1941. At this point in the trial the Government read from Exhibit I, transcript of the former trial in which the perjured testimony was given by the appellant [R. I, 102], wherein at the former trial the appellant had specifically testified that he did not go to Dallas, Texas, until 1942 and that he went to Dallas, Texas, for the first time on January 4 of 1942, attempting to show his recollection of the specific date by his having been discharged from the hospital on the eve of the new year of 1942 and then, in order to hedge on his statement that he had never been there prior to that date, he said that he crashed a plane on Love Field, Dallas, Texas, on Thanksgiving Day, 1940, but that he was never in Dallas between that date and January of 1942. It is obvious from this appellant's testimony that he has a phenomenal memory for dates and that he also has a phenomenal aptitude for fabricating stories to support the untruths which he utters.

The Government then called witness Hugh Hartson who is in charge of the Identification Records Bureau in the Sheriff's Department in Dallas, Texas, and is a captain in that Department. He testified that he knew the appellant

Arthur Lee Flynn; that the appellant was in the jail while he (Hartson) was employed in Dallas, Texas; and that Arthur Lee Flynn (the appellant) was fingerprinted there on April 10, 1941, and he presented the fingerprint record, Government's Exhibit 32 [R. I, 104]. He also produced other fingerprint records, Government's Exhibits 33, 34. 35, 36, and a picture, Government's Exhibit 37.

Undoubtedly, it cannot be disputed that the testimony of these witnesses conclusively shows that Arthur Lee Flynn was not in the Army during the year 1941 and that he was in Dallas, Texas on June 19, 1941, which he denied, and that he was convicted of a felony on June 19, 1941 in Dallas, Texas, all of which he denied under oath. It would seem at a glance that perhaps this count of the indictment was over-proved, but in a case of this type and with this type of defendant it is necessary and was proper that the accumulation of evidence presented was made available in order that there could be not the slightest doubt that this defendant had committed perjury with regard to his statements in connection with the conviction on June 19, 1941 in Dallas, Texas. This evidence also was corroborative and part of the proof on some of the other counts in the indictment.

Count Three.

In the third count of the indictment the defendant is charged with having falsely stated under oath in the impersonation case that he had not received any sum of money from Harry O. Wetzel at any time, and that he did not go into a bowling alley, known as the West Lake Bowling Academy, with Harry O. Wetzel and have a check cashed, and did not thereupon receive $10 from the proceeds of the said check, and that he never at any time

went into a bowling alley with Harry O. Wetzel to have a check cashed, the appellant well knowing that he had gone into the bowling alley, known as the West Lake Bowling Academy, on or about December 2, 1946 with Harry O. Wetzel and then and there had a check cashed for $10 and then and there received the said $10 which constituted the proceeds of said check.

The Government called as a witness Harry O. Wetzel [R. I, 117]. Mr. Wetzel testified that he was a realtor; that he knew the defendant-appellant herein, and had known him since about November of 1946, and that on the 2nd day of December, 1946 the appellant came to his office and asked Wetzel to cash a $10 check for him, and he sent the appellant across the street to the bowling alley to get the check cashed and that the appellant came back and said they wouldn't cash the check for him and then he, Wetzel, went over with the appellant, endorsed the check in the presence of the bartender, Johnny Barger, and the bartender gave the appellant $10 for the check, Government's Exhibit 2. Wetzel identified the check and his signature thereon. Wetzel testified that this all took place in the West Lake Bowling Academy just across the street from his office in Los Angeles, Calif. An attempt was made in the cross-examination of this witness to show that the check was cashed in a bar and that the bar was not the same as the Bowling Academy. But the testimony in the case, including that of the defendant, will disclose that the bar was actually a part of the bowling alley and was generally referred to as the Bowling Academy, and there is no reason for splitting hairs when the defendant contended that his answer denying that he went into the bowling alley did not mean that he denied going into the bar. As part of same count he did, how-

ever, specifically deny receiving any money from Wetzel or from a check endorsed by Wetzel. Defendant's exhibit attached to his motion to vacate designated I was not in evidence at the trial and is not a true exhibit of the premises as alleged by him.

Then the Government called John H. Barger, a bartender employed at the West Lake Bowling Academy, who testified that on December 2, 1946 [R. II, 136] he was employed at the West Lake Bowling Academy, and that on December 2, 1946 he saw the appellant Arthur Lee Flynn and that Flynn came in with a check which he refused to cash and then later Flynn left, came back with Wetzel who endorsed the check, and that he, Barger, laid $10 on the counter which Flynn picked up. He identified Wetzel's signature on the back of the check and the check as the one he cashed on that date.

Keith B. Krug was called as a witness for the Government [R. II, 141] and he presented the records of the Bank of America, Seventh and West Lake Branch [R. II, 187], and Krug testified that on December 3d a $10 check was deposited by the West Lake Bowling Academy corresponding to the check, Government's Exhibit 2, cashed by the appellant in the presence of Wetzel and with Wetzel's endorsement by the witness Barger [see Redirect Examination of Barger, R. II, 141]. This completed the testimony on Count Three, which obviously proved beyond any doubt that the defendant-appellant herein cashed the $10 check, and that he did receive the $10; that the check was cashed at the West Lake Bowling Academy, and that the defendant definitely was there on December 2d and definitely did cash a check endorsed by H. O. Wetzel as he had categorically denied under oath in the impersonation trial in April, 1947 before Judge Weinberger.

COUNT FOUR.

In Count Four of the indictment the appellant was charged with having falsely testified under oath that in 1940 he had been ordered to duty with the Army Transport Command, also known as the Ferry Command in the Army Reserve, and that when released in the summer of 1941 from the Army of the United States he had the rate of Master Sergeant; that he went back into the Army in May of 1942 in the capacity of Master Sergeant and served with the Paratroopers until discharged on March 28, 1946; that he was in the South Pacific with the Paratroopers during 1944, 1945 and 1946, and that he was in the Army continuously from May, 1942 to March 28, 1946 with the exception of the period between March and August of 1943 during which period he was released by the Army to civilian authorities in San Francisco; that there was no other time during the said period that he was not in the Army; that with the Paratroopers he held the rate of Master Sergeant; and that he held a spot commission as First Lieutenant for ninety-six days in the Paratroopers during 1945.

The Government prosecutor read from the testimony of the impersonation trial [R. II, 144, 148] where in the former trial the appellant was cross-examined by Mr. Fitting, the Government prosecutor in that former trial, and the appellant stated, according to that record which had been established in this case as a correct record of the prior case (impersonation trial), that he was released in the middle of 1941 from the United States Army with the rate of Master Sergeant, and that he went back into the Army in April or May of 1942 as a Master Sergeant with the Paratroopers, and that he was with the Paratroopers from then until he was discharged, March 28, 1946; that

he served in the South Pacific; that he was there at various times, 1944, 1945 and 1946.

The Government then called as a witness Bernard Riley, Deputy Sheriff in San Francisco, who testified that he had been in that occupation since 1916; that he is at the time of this trial writ server [R. II, 149]; that he knew the defendant-appellant in this case, Arthur Lee Flynn, and that Flynn was in the jail in San Francisco from the first of February, 1943 until the 21st or 24th of June, 1944, but that he was not at all times in that same Jail No. 1, but that at certain times he was taken to Jail No. 2 at Snead Ranch in San Mateo County. According to this witness the appellant was back and forth from Jail No. 1 to Jail No. 2 from February, 1943 to June, 1944; that he personally remembered the defendant being there during these periods.

The Government then called as a witness Francis J. Smith, Captain of the Watch of the County Jail in San Francisco County, who testified that he knew the appellant and saw him at Jail No. 1 in San Francisco County; and he introduced the records showing Arthur Lee Flynn, whom he identified as the defendant in this case, as having been the same Arthur Lee Flynn who came to San Francisco County Jail February 1, 1943 and remained there either at Jail No. 1 or Jail No. 2 until the 21st of June, 1944; and that according to the records he, the defendant, was then transferred to McNeil Island Penitentiary in the custody of the United States Marshal.

The Government then called William Hanley who was Superintendent of Jails in 1943 at County Jail No. 2, above-referred to, who corroborated the testimony of the former witness, and introduced the record of Jail No. 2 concerning Arthur Lee Flynn, Government's Exhibit 40,

which corroborates further the period of time during 1943 and 1944 which this appellant was incarcerated at the San Francisco Jails No. 1 and No. 2 alternately.

The Government then called George Cammas, Jailer at Jail No. 2 in San Francisco, who introduced additional records in the form of cards, Government's Exhibits 41, 42, 43 and 44, including clothing records, etc. These records corroborate the testimony of the former witnesses that Flynn, the appellant herein, was incarcerated in the San Francisco jails from February, 1943 to June, 1944.

The Government then called as a witness John L. McCoy, Sheriff of Monterey County [R. II, 173]. This witness produced a booking card, Government's Exhibit 45, a fingerprint card, Government's Exhibit 46, an index card, Government's Exhibit 47. These documents showed that on January 29, 1943 the appellant, who was identified by the witness, was in this witness' custody on January 29, 1943 and was turned over to the United States Marshal January 31, 1943; that the appellant came into his custody from the Military Police of Fort Ord and that he delivered the defendant to Deputy United States Marshal Joseph Sweeney of San Francisco on January 31, 1943.

The Government then called as a witness John Merrill, Police Officer in the City and County of San Francisco, who produced fingerprints for Arthur Lee Flynn taken by him February 1, 1943 in San Francisco, Government's Exhibit 48. He also produced a photograph, Government's Exhibit 49 [R. II, 178, 180]. This witness testified that the appellant came to him from Deputy U. S. Marshal Joseph Sweeney. This witness produced a further record showing that on November 30, 1945 this same appellant was arrested in San Francisco, Government's Exhibit 50

[R. II, 181]; and that he was in City Prison from November 30th to December 10, 1945 on a check charge.

The Government then produced Thomas L. Brodmerkel, Police Officer of the San Francisco Police Department, who gave further testimony about the fingerprint record on Government's Exhibit 48 establishing appellant's presence in San Francisco during this period.

Count Five.

In this count of the indictment the appellant is charged with having falsely testified under oath in the impersonation trial before Judge Weinberger that he had not been finally convicted of the felony of impersonating a major of the United States Army on or about March 18, 1943, and that he had so testified under oath knowing the same to be contrary to his oath and false. At this point the Government prosecutor read into the record from the impersonation trial in Judge Weinberger's court [R. II, 192] portions of the record:

> "Q. Mr. Flynn, have you ever been convicted of a felony? A. Not finally, no sir."

Continuing on the appellant was asked if he was on March 18, 1943 convicted of the felony of impersonating a major of the United States Army; he first admitted that he was and then qualified his answers by saying, "No, not finally".

> "Q. Was your conviction affirmed by the Circuit Court of Appeals? A. It was not affirmed by the Circuit Court of Appeals. The Circuit Court of

> Appeals refused to take jurisdiction on a technicality of failure to apply within time in which to file the bill of exceptions within the time fixed by the rule and that the time had been fixed beyond the day of expiration and that the Circuit Court had no jurisdiction. I immediately sued out a writ of habeas corpus and I was discharged, or I was released."

At this point counsel for the Government in the present case produced Government's Exhibit 52, an exemplified copy of a record of conviction in the District Court of the United States, the judgment and commitment record, District Court of the United States, Northern District of California, Southern Division, and also produced an exemplified copy of the opinion and judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Arthur Lee Flynn, Appellant v. United States of America, Appellee,* Circuit Court No. 10498, Government's Exhibit 53.

Exhibit 52 contains the mandate from the United States Circuit Court of Appeals for the Ninth Circuit, signed by the Honorable Harland Fiske Stone, Chief Justice of the United States, on the 29th day of May, 1944, and offered them into evidence. The Government prosecutor then cited *Flynn v. United States,* 139 F. (2d) 669, on which certiorari was denied by the Supreme Court of the United States on May 22, 1944 at 322 U. S. 748.

The Government then called Joseph J. Kennedy, Deputy United States Marshal, Northern District of California, who testified [R. II, 198] that he knew the appellant,

Arthur Lee Flynn; that the appellant was first in his custody on June 21, 1944 at which time he took the appellant in custody at the San Francisco County Jail and transported him with a carload of prisoners to McNeil Island Penitentiary.

The Government then called U. N. Durbin, Supervisor in Charge of Records at the United States Penitentiary at McNeil Island, Washington, who presented the record of Arthur Lee Flynn, Government's Exhibit 56, showing [R. II, 203] that the appellant was received at the Penitentiary on June 22, 1944 and remained there until September 17, 1945. He identified the appellant as the Arthur Lee Flynn to which that record pertains.

The Government then called John J. Hopkins, an Advisory Supervisor of Parole at the United States Penitentiary at McNeil Island, Washington, who identified the appellant as having been in the Penitentiary there from 1944 to sometime in 1945.

The Government then called Matthew T. Curran, United States Probation Officer of San Francisco, California, who testified that the appellant had been under his supervision in San Francisco from the time he left McNeil Island Penitentiary about September 20, 1945, until the 6th day of April, 1946. This witness introduced his record covering the appellant, Government's Exhibit 57 [R. II, 207] showing documents signed in his presence by Flynn, and showing that the appellant was conditionally released from the McNeil Island Penitentiary, and

that he signed certain papers in the presence of this witness, viz., a monthly report in connection with his conditional release, which report was dated January 21, 1946 and signed on that day in the presence of this witness. This establishes the fact that he was parolled from McNeil Island Penitentiary and required to report to Mr. Curran, the Parole Officer, thereafter, and establishes conclusively that he was attempting to mislead the court and testified falsely in Judge Weinberger's court in April of 1947, as is charged in Count Five of the indictment.

COUNT SIX.

The appellant is charge in this count with having testified falsely in that he stated under oath that he was not in the United States Penitentiary at McNeil Island, Washington, in the latter part of 1944 and the early part of 1945. The evidence related under the preceding Count Five above clearly establishes that the defendant falsely testified, as charged in Count Six of the indictment, concerning his not being incarcerated at the McNeil Island Penitentiary in the latter part of 1944 and the early part of 1945. At this point the Government prosecutor read into the record the appellant's testimony in the former impersonation trial before Judge Weinberger:

> "Q. Were you in the army in the latter part of 1944 and the early part of 1945? A. Yes, sir.
>
> Q. Were you at McNeil Island? A. No, sir.
>
> Q. Are you sure of that? A. I am sure that I wasn't there on those dates. It was during the pen-

dency of the writ of habeas corpus which was 1943 and Judge Levy issued the writ. I believe you have my discharge or Mr. Angel has it, your F.B.I. agent."

It is quite obvious from the above quotation as read into the record from the impersonation trial that the appellant was in that case attempting to avoid giving truthful testimony and led the jury to believe in that case that he had not actually been convicted of the offense of which he *had* been convicted, and to impress them with the idea that he was being persecuted and that he was a veteran of the World War, having served his Country overseas in the Paratroopers and thus gain favor and sympathy from the jury in the former trial, which was successful because the Government prosecutor in that case was not prepared to meet the denials with sufficient rebuttal evidence to show the perjury being there committed.

COUNT SEVEN.

In this count of the indictment the defendant is charged with having testified at the former impersonation trial in Judge Weinberger's court that he denied having shown in an application for employment with the Pacific Airmotive Corporation that he was discharged from the Paratroops with the rank of Major on April 28, 1946, and that Government's Exhibit 7, purporting to be the said application, when exhibited to him in the former impersonation trial referred to was not the one he had filled out and that he testified falsely in that matter under oath. At this point [R. 11, 215] the appellant's testimony from the

former trial was read into the record, which discloses that he was shown the said application, Exhibit 7 in the former trial, now Exhibit 3 in the present case, which showed on its face that he had answered certain questions and among them he had stated that he was discharged April 28, 1946 from the Paratroops with the rank of Major; and the Government called as a witness Leonard G. Stearns, Director of Training for the Pacific Airmotive Corporation, Burbank, California. He stated that he had met the defendant-appellant in this case and he examined Exhibit 3, the application above-referred to, and that he had a conversation with the defendant-appellant concerning the said application; that he had asked the appellant to fill out the application; that the appellant filled out the application and brought it in to Mr. Stearns at which time Stearns looked it over and took it to his superior for further scrutiny. He stated that it was the only such application the company had on record from Arthur Lee Flynn. Thus it is conclusively established that when the appellant testified in the former trial that he had not personally filed the application and that he had filed another application by mail in which he had stated his rank as Sergeant Major, not Major, that he was attempting to evade and testify falsely, as charged in Count Seven of the indictment.

Mr. Charles Clifton Smith was called as a witness by the Government and he testified that during November, 1946 he was employed by the Pacific Airmotive Corporation at Burbank, California, as an Industrial Relations

Officer. He was shown Government's Exhibit 3, the application for employment previously referred to by the witness Stearns, and said that he had a conversation with the appellant concerning that application, and that Mr. Stearns was present during the conversation.

The Government then called additional witnesses, including George W. Kyl, who was qualified as a handwriting expert, and who was shown many of the documents introduced into the evidence of this case, including those on which the appellant admitted his signature and those on which he denied his signature, or other writings in the instant case, and after examining Exhibit 3, the application for employment to the Pacific Airmotive Corporation, Mr. Kyl testified that this application was written in the same handwriting as that of the appellant in the other documents [R. III, 255]. He testified that part of the writing was with a different pen than the other part of the writing and that a part of it appeared to have been written by a ballpoint pen and some of it by an ordinary type of pen, viz., that of the appellant in this case.

The Government then called Mr. Paul Fitting, the Assistant United States Attorney who prosecuted the impersonation case before Judge Weinberger and he identified the appellant as the defendant in that case; he testified that he had examined the transcript of the former trial about two weeks after the trial, and that it was identical with the questions which he put and which were answered by the defendant in that case (this appellant).

Argument on Points Raised by the Appellant.

The points relied upon by the appellant on appeal will be considered in their order as listed by him.

I.

That the indictment in this case is a fictitious, falacious, void order. Let it suffice to say that an examination of the indictment will reveal that it is drawn in substantially the language of the statute with regard to the charging part thereof and the facts concerning the allegations of false testimony are set forth in great detail. There is no reasoning by which the indictment could have been held insufficient or fatally defective. It contains the three elements usually considered by courts as the necessary elements of a valid indictment. First: that it is drawn in substantially the language of the statute alleged to have been violated. Second: that it adequately informs the defendant of the charges against him so that he can properly prepare his defense. Third: that the indictment is so worded that it could be set up as a bar to a future prosecution for the same offense or for an offense based on the same set of facts, thus placing him in double jeopardy against his constitutional rights. It is believed that this rule of construction need not be supported at this point by any citations of authority since this court is well aware of the universal application of the rule.

II.

The appellant cites as a second point of error in his case that he was coerced in the going on trial in this case without there being available to him necessary and material evidence vital to his defense; that he was prevented from having evidence available by reason of fraud and deceit having been practiced upon him and false repre-

sentations made to him and his counsel by the prosecuting attorney.

This contention is so obviously without merit that it should receive little or no consideration by this court. The appellant refers apparently in this alleged error to the fact that he requested the court by motion to have subpoenaed a letter allegedly written by the former United States Attorney in Dallas, Texas (Clyde O. Eastus) to the Honorable Daniel M. Lyons, Pardon Attorney, Department of Justice, Washington, D. C., which letter is alleged by the defendant to have stated that the defendant's conviction in the District Court of Dallas, Texas, was based on perjured testimony, and he further refers to his motion for subpoenas to issue to the aforesaid former United States Attorney and Pardon Attorney for their attendance as witnesses at this trial. United States District Judge Mathes who heard the motion properly denied it as not having been presented in accordance with the Federal Rules of Criminal Procedure (Rule 17(b) Federal Rules of Criminal Procedure). There was no showing made by the appellant that the testimony of either of these persons as witnesses would have been material to his case. The alleged letter would have been merely a matter of opinion by Clyde O. Eastus, based upon statements made by the defendant to him concerning the evidence adduced at that trial and would have been hearsay of the rankest type. The record in this case discloses that the prosecutor, Mr. Homer Bell, Assistant United States Attorney in the Southern District of California, attempted, even without order of the court, to secure a copy of the alleged letter from the files of the United States Attorney in Northern District of Texas, who succeeded Mr. Eastus in that office, and his statement in

the record to that effect will be found in Volume III, page 269 of the Reporter's Official Transcript. The full text of the purported letter is set forth on pages 270-271 of the Transcript in which the then United States Attorney, Frank B. Potter, states that a diligent search of the files in that office had failed to disclose a copy of such a letter. There is no showing that the letter existed.

The appellant has stated in his opening brief that Mr. Bell, the prosecuting attorney, had agreed and promised to produce the said letter from Clyde O. Eastus to Daniel M. Lyons and the entire service record from the files of the Army of the United States and that he failed to do so to the prejudice of the defendant (AOB 13-14). As will be seen, efforts were made by the prosecutor, as above referred to, to obtain the alleged letter, and he was unable to do so. The service record of the defendant was produced as Exhibits 28 and 29 in this case and it showed that the defendant was at all times, while in the service, only a private, that he did not ever have a spot commission as a lieutenant; that he never was a major, that he was never even a sergeant or master sergeant, as claimed by him, and that his application for enlistment showed by his own statements that he had never had prior military service. Accordingly, even if the letter which allegedly was written by Clyde O. Eastus to the Pardon Attorney had been made available, it would have been of no material value to this defendant in the instant case.

III.

Under the third allegation of error in his trial, the appellant cites substantially the same reasons why this case should be reversed by restating that he was pre-

vented from having the said witnesses on account of fraud and deceit practiced upon him and false and fraudulent representations made to him and his counsel concerning the production of witnesses and evidence in his behalf. The statement above in answer to his second point suffices as an answer to this point.

IV.

In this alleged error in his trial, the appellant states that he was deprived of having certain official documents, records and other written instruments, then and there the true and lawful property of himself because those documents, records and instruments were unlawfully seized and taken from him and thereafter withheld from him and that such action was abetted and condoned by the prosecuting attorney. The appellant here apparently refers to certain papers which he alleges were taken from him by the agents of the Federal Bureau of Investigation upon his arrest and incarceration. There is no showing in the record that any documents or papers were taken from the appellant's possession by the F.B.I. agents or any other law enforcement officers except his general testimony. His draft card however, which was introduced as evidence in the impersonation case before United States District Judge Weinberger, was voluntarily given to F.B.I. agents at an interview with him, and this allegation by the appellant is totally without merit, based upon the record in this case. This record does not disclose that demand was ever made for production of any such documents allegedly seized from him, either before or during the trial by either the appellant or his counsel. The only reference made to them is a general reference by the defendant in his opening brief and motion to vacate.

V.

This allegation is substantially the same as that in Point III and Point IV and the record discloses absolutely no indication by testimony or otherwise that any promises, agreements or guarantys were made to the appellant or his counsel or that any dissuasion was communicated to him which would in any manner dissuade him from seeking any legal procedures prior to the trial in order to insure the production of any witnesses or documents at the trial in his behalf. The appellant apparently refers here to the conferences between his counsel and the Assistant United States Attorney, Mr. Bell, and the record, as cited before, pages 269-279 of Volume III of the Reporter's Transcript, contains the explanation by the prosecutor, Mr. Bell, of the efforts which he made in an endeavor to secure a copy of the alleged letter and contains adequate explanation of all the negotiations between defendant's counsel and the prosecutor with regard to documents and other evidence mentioned at this point by the appellant.

VI.

The allegation of error contained in Point VI by the defendant is substantially the same as that contained in III, IV and V and the court's attention is directed to Defendant's Exhibits "B-1" and "B-2" submitted in connection with his motion to vacate which is being considered with this appeal. Exhibit "B-1" is a letter from Daniel M. Lyons, Pardon Attorney, Department of Justice, Washington, D. C., under July 7, 1947, to the Honorable Veto Marcintonio, Congressman from New York, enclosing a copy of a letter addressed to Arthur Lee Flynn, the appellant herein, at 306 North Broadway, Los Angeles 13, also dated July 7, 1947. This letter is

Exhibit "B-2" of the appellant herein not in evidence at the trial and lists certain photostatic copies of documents from the Pardon Attorney's files, stating that they are enclosed with that letter to the defendant, Arthur Lee Flynn. A reference to so-called Exhibit "B" will disclose that none of the communications would have been of any material value to the appellant in the trial of this case, since they were not material to the issues of the case in any of the counts contained in the indictment. Instead, these documents were merely communications between the Pardon Attorney and this appellant. There is no showing by the appellant that a pardon was ever issued to him or that he had ever had reason to believe that such would be issued except based upon the alleged statements of Clyde O. Eastus, concerning all of which it must be said, was merely an opinion and that this appellant's knowledge of legal procedures, as can be obviously ascertained from his actions and his testimony, would provide no basis for his alleged *bona fide* belief that he had not been convicted of a felony in Dallas, Texas, on June 19, 1941. It is clearly shown by the record, as before stated in this brief, that he served time in the Federal Correctional Institution at Texarkana, Texas, on a committment under sentence at the conclusion of that trial. The exhibits herein discussed were not introduced at the trial although the date indicates that said documents were obviously in the appellant's possession in ample time to have been presented.

VII.

In this alleged point of error raised by the appellant that the prosecuting attorney knowingly, corruptly and deliberately subornated perjury in the testimony of the witnesses produced at the trial of this case, it should be

sufficient to state to the court that a mere reading of the testimony of every witness who appeared at this trial would conclusively negate such an allegation.

VIII.

Appellant has gone beyond the record to accuse the FBI Agents and the Assistant United States Attorney who tried the case, of gross misconduct. Appellant, however, has not made any citations to the record. His accusations of misconduct are not documented but rest solely upon his own assertions written into his brief. It should be noted that he was represented by an attorney at the trial of the case. In this appeal he is appearing *in propria persona*. Had there been any misconduct in the proceedings before the District Court it may safely be assumed that his trained counsel would have noted them and made timely objection. Likewise it must be assumed that the failure of appellant to support his charges by any reference to the record substantiates the reply of the Government that there was no misconduct and that the record does not show any, and also gives rise to the compelling inference that appellant in his enthusiasm to work up a ground for complaint has imagined grievances which exist only in his own mind and which did not suggest themselves to the learned counsel who conducted the trial on his behalf. However, as the charges made—although loosely made—impute misconduct to the Agents of the Federal Bureau of Investigation and to the prosecuting attorney, appellee does categorically deny each and every accusation of misconduct allegedly committed by the Agents of the Federal

Bureau of Investigation and the Assistant United States Attorney who prosecuted the case. Among the allegations of misconduct charged in Appellant's Opening Brief is the following:

> "The appellant now accuses the prosecutor of having produced in court an array of females alleged to have been a 'group of nondescript, garishly attired females, adorned with the gaudiest and cheapest of jewelry, highly painted countenances and giving every evidence by their appearances of being either burlesque-stage habitues or that of bawdy houses. One of their number, in particular, was by far the most conspicuous. She affected daily changes in the mode of her hair arrangements so bizarre as to be beyond word-description and the scantiness of her clothing so extreme as to barely pass for a bathing costume' * * * (AOB 35-37)."

Like the other allegations of misconduct there is no reference to the record. The allegation is denied *in toto*. Even if it were true it is impossible to see what bearing it had upon the trial. The only suggestion that was relevant in any way is the intimation that the questioning of appellant in cross-examination concerning his marital affairs—while the women described in appellant's brief were in the courtroom—in some way suggested that the women in the courtroom had some relationship to the appellant or his affairs. Trials of criminal cases are public proceedings; neither appellee nor appellant has a control over persons who come and go during the conduct of a trial. If appellant had felt during the trial that he was prejudiced by the presence of the women complained of,—that was the time to make objection so that the court could have an opportunity to clarify the situation and take any immedi-

ate steps indicated. The record, however, is barren not only of any objection by appellant but of any indication that any women were present in the courtroom at all, except of course those present on the jury.

IX.

The ninth point relied upon by the appellant on appeal charges error to the court in admitting testimony which was incompetent, irrelevant, immaterial, improper, redundant, prejudicial and unlawful. This allegation is very broad and is referred to in appellant's opening brief in no specific manner, but he has charged in his opening brief variously that the evidence was insufficient to support the allegations of the indictment and that the evidence was redundant and cumulative to the extent that it became prejudicial by its volume and in revealing prior arrests and fingerprinting, taking into custody, etc., so it would seem that little or no consideration should be given to this alleged error since the statement of facts contained in this brief as applied to each of the counts of the indictment will disclose to the court that all of the testimony of the witnesses produced by the Government was material, was proper, was not prejudicial, was not redundant and was not unlawful, but in view of the circumstances of the case, the type of prosecution and the astuteness of the appellant in fabricating testimony to suit his own purposes was all necessary to establish his guilt beyond a reasonable doubt.

X.

The allegation that the trial court erred in admitting testimony and exhibits in this point relied upon by the appellant is answered by the explanation to Points No. VIII and No. IX above and would be superfluous and

wasteful of this court's time to reiterate in answering this allegation.

XI.

It is alleged in the eleventh point that the court erred in failing to grant the motions made by defendant's counsel at the end of the prosecution's main case; that is to say, the motion for a judgment of acquittal on count three of the indictment and succeeding motions. The basis of the first motion was that the testimony of Mr. Wetzel on the stand in the impersonation case on April 22, 1948, was to the effect that *he* went to the bowling alley and cashed the check, whereas he now testifies that *he and the appellant* had gone to the bowling alley and cashed the check.

The court overruled this motion because the testimony does not show any material inconsistency between the testimony of Wetzel in the two cases and that it was competent to go to the jury. The facts are that he testified that he went to the bowling alley with the appellant and endorsed the ten dollar check at the bar which is located in the bowling alley building and is always considered as the same establishment, namely "the bowling alley" because it was under the same management, and had one address. This was also the testimony of the bar tender, and to all intents and purposes was the bowling academy with the bar in connection therewith. There is no controversy over the testimony of Wetzel and the bar tender, that the ten dollar check was cashed at the bar located in the same building, at the same address, as the bowling alley. The objection is entirely without merit because appellant denied ever cashing any check at any time endorsed by Wetzel. Therefore no credit can be given to this contention as related to that motion.

The second motion referred to was properly overruled, that being a motion which had been denied without prejudice by United States District Judge Mathes for the production of a witness from Washington, D. C., namely, the Pardon Attorney, for the reason that it did not conform to Rule 17(b) of the Rules of Criminal Procedure. The trial court properly overruled that motion because under Rule 17(b), Federal Rules of Criminal Procedure, in order for an indigent defendant to secure the attendance of a witness at Government expense by order of court, it is necessary for the defendant to show, among other things, the testimony that would be given by the witness and its materiality to the case at bar. There certainly was no showing of materiality of the Pardon Attorney's testimony or that of Eastus, the former United States Attorney. Accordingly, the trial judge properly overruled the motion as had been done by Judge Mathes before the trial of the case.

The record does not clearly show that the appellant's counsel made a motion for judgment of acquittal on the entire indictment, but the record does disclose [R. III—275] that the court denied all motions made at this time and if an over-all motion for judgment of acquittal on the entire indictment was made, it was properly overruled by the court. Accordingly, there is no merit in the contentions of the appellant that error was committed by the trial court in the eleventh point.

XII.

The twelfth point cited by the appellant as error by the trial court in failing to grant a motion during the trial for continuance until such time as the prosecutor would produce certain witnesses and evidence in accord-

ance with a stipulation in the record at the inception of the trial is entirely an erroneous citation of error based upon the record, for the reason that there is no showing in the record of the stipulation by counsel that any witnesses or evidence would be produced which was not produced. There was an attempt, however, by the prosecutor to secure the much-talked-of letter allegedly written by Clyde O. Eastus to the Pardon Attorney, and the record will show that the prosecutor was most cooperative in attempting to obtain all evidence possible on behalf of the defendant, even where the same was not considered to be material. In the transcript of the record of the case, Volume III, page 275, it should be noted that Mr. Green, the defendant's attorney, stated: "I submit that Mr. Bell has been cooperative in attempting to obtain the evidence. However, it is an unfortunate delay." There is no prejudice shown by the failure to obtain this evidence because it is obvious from the discussions throughout the trial concerning it that it would not have been material and would not therefore have been admissible in the case. Accordingly, no charge of suppression of the evidence should be given serious consideration nor should serious consideration be given to the appellant's contention that the trial court erred in not granting a continuance for the purposes of obtaining immaterial evidence.

XIII.

This point raised by the appellant is totally without merit since a mere reading of the facts in evidence as compiled in this brief under the Statement of Facts is sufficient to show that all of the evidence was lawfully admitted and was sufficient to sustain every allegation in every count of the indictment.

XIV.

This fourteenth point relied upon by the appellant in his appeal, is like the others,—totally without merit for the reason that the statements made by the prosecutor during the trial were preface remarks advising the jury of the evidence to be produced in support of the allegations and in his argument at the conclusion of the trial, he stayed entirely within the record as shown by the transcript. The alleged willful misconduct, as previously discussed herein, is merely a figment of the appellant's imagination and in no way borne out by the record either by the written report of the trial or the inferences which may be drawn therefrom.

XV.

This point relied upon by the appellant is also totally without merit, being simply an allegation of the same alleged misconduct as stated in Point XIV but stated in different words, and apparently refers specifically to the alleged gestures of the prosecutor and the courtroom seating of the female spectators which has previously been discussed and which is obviously a figment of the appellant's imagination and an attempt to mislead this court in consideration of the real issues of the case.

The foregoing disposes of the specific allegations of error and points relied upon by the appellant in this appeal. In the following discussion of appellant's brief, an effort will be made to concisely state to this court the high points of the evidence and to cite the law relating to each of the points considered to be important with regard to admission of evidence and the rulings made by the court during the course of the trial.

Comments on Appellant's Brief.

At the outset in his statement of facts the appellant has included many matters which are not a part of the record in this case. He recites his background indicating that he was a lawyer in the State of New York for several years in the later twenties and the early thirties, but there is no evidence in the record to show any such qualifications. He also expounds at length about matters concerning alleged fraud by his employer, North American Aviation Company, Inc., in Dallas Texas, which is not properly a part of the record, nor does it have any bearing upon the issues in this case.

In the appellant's opening brief at page 4 he makes accusations against the law enforcement authorities that he was taken from a Dallas County Jail, beaten and abused, and at all times starved, etc., and charges that he was continually mistreated and kept in custody without cause, all of which is not a part of the record in this case, and if it had been a part of the testimony it would have been properly controverted by witnesses for the Government as the charges are utterly untrue. He also alleges on page 6 of his opening brief that while in the company of Clyde O. Eastus, former United States Attorney in Texas, they were fired upon by persons said by Eastus to have been F.B.I. agents, and he gave this as the reason why he received authority from Eastus to carry a gun. There is no testimony even by the defendant in the case that he was fired upon by anyone or that he was mistreated in any manner by law enforcement officers, including F.B.I. agents and United States Marshal, but all of this matter is brought up in appellant's brief and should not receive consideration by this court in connection with the case. It was his privilege and right to have testified to

this at his trial if it were material to the issues of the case, but it is the Government's contention that it is not material in any way to the issues.

Appellant sets forth in his brief at page 9 an alleged order restoring him to duty in the Army of the United States on September 25, 1945. The Army personnel file on the appellant, which are Exhibits 28 and 29 in this case, does not contain any such order, nor is there any exhibit in the record by the appellant of such an order having been issued. He attaches to his motion to vacate an exhibit purporting to be excerpts from Army orders. In connection with the order the appellant states that he was advanced to the rate of Master Sergeant, assigned the detail of Sergeant Major, and served in the South Pacific Theatre of the War. This is contrary to his own testimony as regards the rank or rate which he had because he admitted under direct examination in this case by his own attorney [R. III, 329-32; R. IV, 371-2; that at all times while he was in the Army he was a Private, and it is quite obvious that he knows the difference between being a Private and being a Master Sergeant. He explained that Sergeant Major was not a rank or rate but a military term connoting a certain assignment of duties usually clerical.

On page 10 of his brief he sets forth another alleged Army order dated May 28, 1946 which likewise did not show up in the personnel file of the Army pertaining to appellant and is not evidenced by any such exhibit in the trial of this case by either the Government or by the appellant himself.

On page 11 of appellant's brief he accuses the F.B.I. agents of arresting him and taking valuable papers away

from him on December 15, 1946 upon a public street in Los Angeles. This charge is unfounded. He did not make these accusations in his testimony at the trial of the case or it could have been and would have been controverted by testimony of the F.B.I. agents in rebuttal. He raises these matters for the first time upon appeal.

On page 12 he recites matters concerning threats made against him by former associates in his employment in Dallas, Texas, in connection with the various cases in court in that jurisdiction which also were not a part of the record in this case. On this same page of his brief he states that his wife filed an action against F.B.I. Agent Spencer for having assaulted her and that he was therafter visited at the county jail by two F.B.I. agents who attempted to secure a signed statement from him absolving Agent Spencer of any wrongdoing in the matter and upon his refusal to do so he was threatened with bodily harm and would be re-indicted for a dozen counts of perjury. All of this is denied and is a matter which was not testified to in the case by him or any witness, and if it had been testified to by him at the trial of the case and had been permitted as relevant matter, it would have been refuted by testimony of the agents who were available to the Government and would have been called in rebuttal.

On page 14 of his brief the appellant sets forth the fact that thirty prosecution witnesses were produced in the trial and that twenty of them were law enforcement officers or Government employees and he intimates that he was denied a fair trial because only he and his wife were witnesses for him at the trial of his case as against the testimony of all these Government attachés. This contention of course is wholly without merit since every witness called was called for a particular purpose and

gave testimony freely and voluntarily and was cross-examined by appellant's attorney who was in constant conference with appellant and whose handling of the case was to a great degree controlled by appellant himself as to form and manner in which the various witnesses were handled in behalf of the appellant.

On page 15 of his brief the contention is made that the items of perjury contained in the indictment and based upon the testimony of the appellant at his former trial in Judge Weinberger's court were not matters material to the issues in said trial. It is of course quite obvious that they were matters material to the issues in that trial because those very perjured statements by the appellant in that former trial were obviously, when considered by the jury, of great weight in convincing the jury of a reasonable doubt of his guilt in the former trial which resulted in an acquittal. If those perjured statements could have been anticipated at the time of the former trial and controverted therein as they were in this trial, he undoubtedly would have been convicted because his impeachment as a credible witness at the former trial would have been complete.

On page 17 of his brief he attempts to argue that statements made in explanation of an answer cannot be deemed to be perjury. It should be borne in mind, however, that the oath is to tell the truth, the whole truth and nothing but the truth, and thus any statements which are false and misleading and knowingly made by the witness is of course perjury and material as the answer to the main question. He is quibbling over terms such as "federal employee," "conviction for murder or manslaughter," etc. His arguments on this point on the page cited and succeeding pages have no basis for serious con-

sideration by this court. Likewise, his argument on page 19 concerning the words of the indictment, in which he cites *Hogue v. U. S.,* 184 Fed. 245, and *Wharton's Criminal Law,* Vol. 2, Sec. 1552, contending the indictment should use the words "feloniously and corruptly," etc., is not convincing that there was any deficiency in the indictment in this case. He has said on the same page of his brief that there is no affirmative allegation that he swore either falsely or corruptly, or that there is any affirmative allegation that any of the alleged statements by the appellant was false. The use of these terms would be merely surplusage since they are in the nature of conclusions and a mere reading of the indictment as heretofore stated will show that he is charged affirmatively with having knowingly and wilfully made statements which are untrue and that he then and there knew they were untrue. These words alone are sufficient to sustain the indictment.

We do not dispute the contention of the appellant that there can be nothing charged in an indictment by implication or intendment and that every part in the indictment must be certain, clear and unambiguous, in support of which he cites *U. S. v. Potter,* 56 Fed. 83, and *U. S. v. Philadelphia and Reading Railroad Company,* 232 Fed. 953-955, but there is no such deficiency in the indictment in this case; every allegation is charged clearly and unambiguously. It is obvious by the reading of the indictment that it conforms to 18 U. S. C. 558, and the appellant's contention that it does not is obviously without merit.

His contention page 22 of his brief that there was duplicity in the various counts because more than one statement of perjury was included therein is likewise

totally without merit. The cases cited by the appellant do not support his contention of duplicity.

Appellant's contention on page 24 of his brief that the introduction of the numerous fingerprint cards was erroneous for the reason that it was incompetent, irrelevant, immaterial, and that the evidence was redundant and highly prejudicial, is totally without merit for the reason that the record discloses clearly that the cards containing his fingerprints were introduced into the record as positive proof that he was at certain places at certain times and could not have been at places he had testified he was on those certain dates, thus tending to positively prove by overwhelming evidence that he was testifying falsely, and the large number of instances wherein he was placed at certain geographical locations and in the presence of certain persons proved additionally that when he made the false statements in his previous testimony he knew full well that he was testifying falsely.

On page 27 of appellant's brief he states that it is the rule with regard to proof of former convictions that such former convictions and the proof thereof is irrelevant and immaterial and therefore not admissible and that proof of offenses other than those charged in the indictment is generally inadmissible and constitutes prejudicial error even though the separate offenses may be of a similar nature. In general this is probably true, but proof of a prior conviction is admissible not only to impeach the credibility of a witness but also to show, (1) motive, (2) intent, (3) the absence of accident or mistake, (4) or a common scheme or plan.

Gordon v. U. S., 254 Fed. 53;
McDonald v. U. S., 264 Fed. 733;
Paris v. U. S., 260 Fed. 529.

It was obviously necessary, as the court will recognize, because of the nature of this prosecution, to introduce documents for the purpose of proving the allegations in this case, which incidentally indicated other convictions but which were not introduced for the purpose of proving the prior convictions even for the purposes of impeachment. The fact that other convictions came before the jury was merely incidental, and relevant evidence in a case of this nature cannot be denied admissibility for such a reason. Additionally, it should be noted by the court that the trial judge's instructions were complete and clear to the jury with regard to the purpose for which this evidence as a whole was introduced, and the jury were instructed to not give extra weight to evidence simply because there is more of it but it is to be weighed for its veracity and importance and for its authenticity. Accordingly, no prejudice to the defendant resulted from the introduction of Federal Bureau of Investigation identification records or similar records of other law enforcement agencies. Consequently the allegations by the appellant in his brief of the details concerning these exhibits need not be discussed in this answer to any great extent.

Previously discussed in this brief is the matter of the conduct of the prosecutor, particularly referring to Appellant's Opening Brief, pages 35 and 36. In the interest of brevity these pages are not reproduced here, but the court's special attention is directed to a close reading of those two pages of fiction. The appellant at that point in his brief has fabricated a fictional story without one scintilla of truth except that the two women to which he refers admittedly were extremely attractive in their attire. Their attire, however, was entirely conventional in every respect and, since they were perhaps the only spectators

who sat throughout the trial, provided a subject for this appellant's imagination to run away with him. One of the ladies was the wife of the prosecutor, the other was a friend of hers, and the uniqueness of the situation involved in this trial was such that they had a special interest in attending and, more especially, because of the personal interest in observing the prosecutor at work. It is categorically denied that the prosecutor ever made gestures toward the spectators or any of them or that either of the ladies ever arose from her seat to make any menacing motions or any other motions during the trial of the case. These allegations alone should convince this court of the caliber of mind possessed by this appellant and in itself is ample reason for this court to affirm the conviction in this case when due consideration is given to the fact that a jury of twelve men and women observed him throughout the trial in which they heard the evidence presented and voted a verdict of conviction on every count in the indictment. It should be obvious to this court that if the prosecutor's actions at the trial of this case ever approached to the slightest degree the alleged misconduct stated by this appellant on these two pages of his brief to be true facts, there would have been numerous objections by defense counsel, and at the same time there is little likelihood that any federal judge would have permitted the slightest amount of such misconduct to have occurred in his court room. Yet no place in the entire record of this case was there any objection made to the conduct of the prosecutor, nor for that matter the conduct of the defense counsel.

The appellant charges (AOB 38) that his certificate of service from the Army was stolen from him prior to the trial of Cause No. 19209 (the impersonation case in

April, 1947 before Judge Weinberger) by Federal Bureau of Investigation Agents Angel and Irwin and was in possession of the prosecutor throughout the trial of that case. He further states that he went on trial in this case upon the assurance of his counsel that the prosecutor had the said service record and would produce same to him at the trial. In his brief, appellant has referred to testimony given by him at the trial that FBI Agents Angel and Irwin took his service certificate from him. This is not true and the record does not reflect that he so testified. The record does show that appellant did testify that FBI agents had taken numerous papers from him and that these papers were never returned to him. He did not specify what those papers were. In the absence of his ability to state what was taken from him it was impossible for Government witnesses to specify what papers they did not take from him. The rebuttal was therefore as broad as the accusation. Furthermore, appellant made no request either before or during the trial for the production of any documents which he contended had been taken from him.

The facts are that on December 8, 1946, Federal Bureau of Investigation Agents Angel and Irwin, referred to by the appellant, visited the appellant and his wife in their room in a hotel at 729 South Bonnie Brae Street, Los Angeles, California. He voluntarily produced his draft board registration card, and with his permission the card was retained by Agent Angel.

In the motion to vacate the judgment made by this appellant and being considered with this appeal on pages 2 and 3 the appellant states that about the 15th of December, 1946, appellant was "picked up" by two F.B.I. agents and detained in the room of a nearby office building for a period of some three to five hours. This is not in any

manner a true statement of fact. The facts are in this connection that the appellant called at the Los Angeles office of the Federal Bureau of Investigation on December 12, 1946 and voluntarily furnished a signed statement. He was not searched, no papers of any kind were taken from him, and the statement was furnished to Special Agent Angel alone. He was not questioned by any other person and at no time was he "picked up" or taken into custody and detained at an office building and later taken to the Los Angeles Federal Bureau of Investigation office. During the interview on December 12, 1946, which lasted approximately two hours, Special Agent John J. Sullivan was present.

With regard to the appellant's arrests there was a warrant issued by the United States Commissioner at Los Angeles on December 17, 1946, on a complaint charging impersonation. It was two months and ten days thereafter (February 27, 1947) that the appellant was arrested at Sacramento, California, by Federal Bureau of Investigation agents on this warrant. The appellant had then been a fugitive using the alias of Jerry Arthur Lee, and when brought before the United States Commissioner on removal proceedings was identified by the testimony of a finger print expert to the effect that the finger prints of Arthur Lee Flynn on a previous occasion were identical with the finger prints of Jerry Arthur Lee arrested on that occasion. He then went to trial in the impersonation case from which grew the charges of perjury which are the subject of this prosecution and appeal; and after he was acquitted on his perjured testimony at the impersonation case tried before Federal Judge Weinberger in Los Angeles on April 22 and 23, 1947, Assistant United States Attorney Paul Fitting, who conducted the prosecu-

tion in the impersonation trial, authorized a complaint and the arrest of the appellant for the commission of the perjury in the said impersonation trial.

In pursuance of this authorization, F.B.I. Agent Jack Spencer, in whose presence the felony of perjury was committed, arrested the appellant at 3836 West Avenue 43, Los Angeles, California, about 7:30 p. m. on April 23, 1947. This arrest was made after the hours for filing a complaint and was made jointly by Agent Jack Spencer and Agent Carol Doyle. The said arrest was made promptly and without a warrant for the reason that the agents had knowledge of the appellant's prior successful attempts to avoid arrest and with the reasonable assumption that he would again become a fugitive. At the time of the arrest the appellant's wife was present and attempted to interfere with the arrest. No force was used against her or any attack made on her person by the arresting agents but, nevertheless, on April 25, 1947, she filed a civil action against F.B.I. Agent Jack Spencer for assault. This suit was wholly without merit and the agent was defended by the United States Attorney's office in the Southern District of California before the Superior Court for Los Angeles County, and subsequently the action was dismissed on the motion of plaintiff's attorney Robert H. Green, March 6, 1948. It should be noted that Robert H. Green is the attorney of record for the appellant in this case. Subsequent to the arrest on April 23, 1947, and at the earliest possible date and hour the authorized complaint was filed before U. S. Commissioner Head in Los Angeles, California, by F.B.I. Agent Spencer, this being on the morning of April 24, 1947, and a warrant issued thereon. The appellant was arraigned at 10:30 a. m. on the same date and upon the preliminary hearing,

sufficient cause being found by the Commissioner, the appellant was bound over to the grand jury, who subsequently indicted him in the seven counts of perjury which is the subject of this trial and appeal.

In connection with the matter of the charges against F.B.I. Agent Spencer in the civil action, the Court's special attention is directed to Appellant's Opening Brief, pages 12 and 13, wherein the appellant accuses the Federal Bureau of Investigation agents of conduct which accusations are obviously so ridiculous that this Court could give no serious consideration to them, and especially after seeing the inconsistencies of this appellant's statements, both under oath and otherwise, revealed time after time in the record of this case.

Conclusion.

In conclusion let it be said that the evidence presented by the Government in the trial of this case is obviously competent, relevant and material in every instance. It is admissible without a question of doubt in every instance. It is cumulative to a high degree although in no manner superfluous to prove the allegations of the indictment. The mere fact that prior offenses committed by this appellant were incidentally revealed by the evidence is not reason for reversal on account of prejudicial error.

The contentions of the appellant that he was denied the production of evidence necessary to his defense by fraud and deceit practiced upon him and his counsel by the prosecutor is by the record totally unwarranted and without merit and revealed by the record itself.

The allegations made in the Appellant's Opening Brief and in his motion to vacate the judgment that he was beaten, that he was threatened, that he was robbed and

illegally searched and that papers were illegally seized from him, and that he was otherwise generally mistreated by the agents of the Federal Bureau of Investigation and others, are allegations wholly without merit not supported by the record even in his own testimony under oath or otherwise. Thus the appellant's obvious attempt to befog the issues in his false castigation of the Government's representatives, and his attempt to show that he was persecuted rather than prosecuted, will undoubtedly be considered by this Court in its proper light and be given no serious consideration.

Accordingly the record sustains the conviction to every count of the indictment; the trial court did not err in the admission of evidence in any manner or to any degree prejudice the rights of this appellant. The record clearly bears out the conclusion that he had a fair and impartial trial and was duly convicted by a jury after having been given his day in court with all possible safeguards to his constitutional rights.

Respectfully submitted,

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